Date: 20080527

Docket: IMM-4132-07

Citation: 2008 FC 673

Ottawa, Ontario, May 27, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JASBIR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow, I grant Mr. Singh's application to set aside the decision of the Immigration Officer who found that Mr. Singh's marriage was not genuine and was entered into primarily for the purpose of acquiring permanent residence status.

BACKGROUND

[2] Mr. Singh is a 24-year-old citizen of India. He arrived in Canada on December 14, 2003, on a student visa which was valid until March 4, 2006. On March 3, 2006, he married Jyoti Malhotra, a permanent resident of Canada. On June 12, 2006, he applied for permanent residence as a member

of the spouse or common-law partner in Canada class. On September 13, 2007, he and his spouse were interviewed jointly and then separately by an immigration officer. The Applicant's immigration consultant and an interpreter were present during these interviews. On September 26, 2007, the officer determined that Mr. Singh did not meet the membership requirements because his was not a genuine marriage and had been entered into primarily for the purpose of acquiring status under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

ISSUES

[3] The Applicant essentially raises two issues:

1. Did the officer err in deciding that the Applicant's marriage was not genuine; and
2. Did the officer fail to observe procedural fairness?

[4] With respect to the first issue, the Applicant submits that the officer's decision is not supported by the evidence. He asserts that the officer ignored or failed to give sufficient weight to the consistent information given by the Applicant and his wife during their interviews. It is argued that the officer's decision was based on insignificant discrepancies in their evidence during the interviews.

[5] The Applicant argues that the decision of the officer was unreasonable and further, that in ignoring or failing to give appropriate weight to some of the evidence, the officer committed an error of law.

[6] With respect to the second issue, the Applicant submits that the officer committed three procedural errors. First, the officer did not provide the Applicant or his wife with an opportunity at the end of the interview to address the inconsistencies that were of concern. Second, the Applicant submits that the officer failed to respond to a request to provide the Applicant's current counsel with copies of all of the documents which were presented to the officer by the Applicant and his spouse. Apparently, the Applicant's immigration consultant failed to make copies of the documents he provided to the officer. Third, the Applicant takes issue with the reasons and asserts that they do not contain any analysis sufficient to allow the Applicant to know why his application was rejected.

RELEVANT LEGISLATION

[7] The relevant legislative provisions are sections 4 and 124 *Immigration and Refugee Protection Regulations*, SOR/2002-227.

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	**4.** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.
…	…
124. A foreign national is a member of the spouse or common-law partner in Canada	**124.** Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions

class if they	suivantes :
(a) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;	a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;
(b) have temporary resident status in Canada; and	b) il détient le statut de résident temporaire au Canada;
(c) are the subject of a sponsorship application	c) une demande de parrainage a été déposée à son égard.

ANALYSIS

[8] The standard of review with respect to the first issue raised by the Applicant is reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Khanna v. Canada (Minister of Citizenship and Immigration)*, 208 FC 335, at paras. 4 and 5.

[9] The standard of review with respect to the issue of procedural fairness in the second issue is that of correctness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para. 100; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

Did the officer err in deciding that the Applicant's marriage was not genuine?

[10] I agree with counsel for the Respondent that the Applicant is essentially asking this Court to re-weigh the evidence and come to a conclusion different than that of the officer. That is not this Court's function on judicial review. As noted, the question for this Court is whether the officer's decision was one reasonably open to her on the evidence.

[11] There is no merit in the argument advanced by the Applicant that the officer failed to consider or give sufficient weight to the evidence that supported the genuineness of the marriage. The officer in her decision sets out those areas where the evidence was similar and supported the claim of the Applicant that the marriage was genuine. She sets out 12 such similarities to which she gives appropriate weight. However, the officer then goes on to note 11 discrepancies, not all of which are of a minor character, and which formed the basis of her conclusion that the marriage was not genuine.

[12] Accordingly, while this Court may have arrived at a different conclusion with respect to the genuineness of the marriage, the decision reached by the officer was open to her on the evidence she gathered from the interviews and accordingly, cannot be set aside as requested.

Did the officer fail to observe procedural fairness?

[13] The Respondent is correct in asserting that inconsistent statements made by spouses in separate interviews regarding the *bona fides* of the marriage are not evidence that an officer is required to put to an applicant for explanation: *Dasent v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 79 (C.A.) at para. 5, application for leave to appeal to the S.C.C. dismissed, [1996] S.C.C.A. No. 141; *Oppong v. Canada (Minister of Citizenship and Immigration)* (1996), 193 N.R. 306 (F.C.A.), application for leave to appeal to the S.C.C. dismissed, [1996] S.C.C.A. No. 140.

[14] As to the complaint that the Applicant has not received copies of documents that had been initially provided to the officer, I do not see any legal basis on which that constitutes an error of law or procedural unfairness.

[15] While I reject the first two bases on which the Applicant asserts a denial of procedural fairness, the last basis, that the reasons do not contain any analysis sufficient to allow the Applicant to know why his application was rejected, has merit.

[16] The officer's reasons are quite detailed in her review of the evidence, both favourable and unfavourable to the Applicant with respect to the issue of the genuineness of his marriage. However, that is only one of the two branches of the test set out in section 4 of the Regulations.

[17] Once the genuineness of the marriage had been examined, the officer then had to examine whether the relationship had been entered into primarily for the purpose of acquiring status under the Act: *Donkor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089. As was noted by Justice Hughes in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490:

> Both branches of the test must be met before a person cannot be considered a spouse or partner. While the Applicant bears the onus of proof at this stage to demonstrate that a reviewable error has occurred, if the Applicant succeeds in that respect on only one of these two branches of the test, then it is open to the Court to find that a reviewable error has occurred.

[18] The officer here quite extensively reviewed the evidence before her, but did so only in the context of the first question, i.e. whether the marriage was genuine. She failed to provide any

explanation for the basis on which she reached the conclusion that the relationship had been entered into primarily for the purpose of acquiring status under the Act. She states to having reached that conclusion but she fails to provide any explanation as to how or why she reached that conclusion. Counsel for the Respondent at the hearing of this matter suggested that the mere fact that the marriage was entered into one day before the Applicant's student visa was to expire could form the basis of that decision. Whether that is so is irrelevant as there is nothing in the reasons indicating that was the basis on which the officer reached her conclusion that the marriage had been entered into primarily to enable the Applicant to acquire status under the Act. It is the duty of the officer to explain clearly in her reasons why she reached that conclusion. It is not for this Court or Respondent's counsel to speculate as to the reason that the officer reached her conclusion.

[19] Accordingly, in my view, the officer's decision in not providing any analysis to support the conclusion reached with respect to the second branch of the test under section 4 of the Regulations is deficient. In *Adu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 693, Justice Mactavish correctly summarized the legal principles behind the obligation to provide reasons in the following manner, in paragraphs 10 and 11:

> In *Baker* [[1999] 2 S.C.R. 817], the Supreme Court of Canada noted that in certain circumstances, the duty of procedural fairness requires the provisions of written reasons for a decision. This is especially so where, as in this case, the decision has important ramifications for the individual or individuals in question. According to the Court, "It would be unfair if the person subject to a decision such as this one which is so critical to their future not be told why the result was reached". (at para. 43).
>
> The importance of providing 'reasoned reasons' was reiterated by the Supreme Court three years later in *R. v. Sheppard*, [2002] 1 S.C.R.

> 869, 2002 SCC 26, where the Court noted that unsuccessful litigants should not be left in any doubt as to why he or she was not successful. Although *Sheppard* was a criminal case, the reasoning in that case has been applied in the administrative law context generally, and in the immigration context in particular, in cases such as *Harkat (Re)*, [2005] F.C.J. No. 481, *Mahy v. Canada*, [2004] F.C.J. No. 1677, *Jiang v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 597 and *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1415.

[20] In this instance, the absence of any reasoning behind the conclusion that the marriage was entered into primarily for the purpose of obtaining status under the Act leaves the Applicant and this Court in doubt as to why the Applicant was not successful in his application.

[21] No serious questions of general importance were proposed and none will be certified.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. The application is allowed and the matter remitted for reconsideration by another officer after a fresh interview of the Applicant and his spouse; and
2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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